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Legal history

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Alongside the legislation, in contractual practice certain clauses have been developed to address specifically the issue of unexpected circumstances. Even though such terms have become more and more common in the form of the so-called hardship clauses, they are not considered to be an element of the *lex mercatoria*. The parties' purpose behind the use of hardship clauses is to solve the issue of unexpected circumstances without intervention by the courts. However, inasmuch as vague standards are applied in hardship clauses, judicial intervention is unavoidable if amicable solutions cannot be achieved. A model hardship clause is provided by the International Chamber of Commerce (ICC). Another such common contract term with some affinity to the issue of unexpected circumstances is the so-called Material Adverse Change (MAC) clause used in contracts dealing with mergers and acquisitions. Yet, these clauses typically refer to the period between 'signing' and 'closing' and therefore they control issues that arise before the contract has become final.

10. Matters not dealt with

Changes of circumstances may become an issue not only in private law but also in administrative law. This field of law is not dealt with in this volume. It is worth mentioning, however, that, under French law, there is a famous contradiction between contract law and administrative law with regard to unexpected circumstances: while the French civil courts do not recognise the doctrine of *imprévision* as a mechanism to set aside a contract (*Canal de Craponne*), the administrative courts have applied it. Another example not dealt with in this volume is public international law. Article 61 of the Vienna Convention of the Law of Treaties of 1969 for instance deals with impossibility of performance and Article 62 deals with 'fundamental change of circumstances'.

2 Legal history

ANDREAS THIER

1. Unexpected change of circumstances: perspectives of legal history

From the historical perspective, basically three legal concepts are worth exploring with regard to the influence of an unexpected change of circumstances on legal transactions. The first one, the *clausula rebus sic stantibus* doctrine, has its roots in Roman philosophy and was developed as a normative rule during the Middle Ages. Second, the concept of (tacit) presupposition ('*Voraussetzungslehre*') emerged in the German legal discourse of the late nineteenth century. At the same time the third doctrine to be examined here, the idea of *frustration of contract*, was created by the English courts in order to cope not only with an unexpected change of circumstances in general, but also with cases of impossibility. In Section 2 below the Roman foundations of the *clausula* rule and the emergence of this doctrine during the period of the *ius commune*, which began in the thirteenth century will be discussed. Section 3 addresses the development of that doctrine in the Early Modern Period between the sixteenth and the eighteenth centuries. The final section will focus on the development during the nineteenth and the early twentieth centuries in which the doctrine of presupposition and the idea of frustration have come to the fore (section below).

2. The emergence of the *clausula* doctrine

In ancient Roman law the stability of contracts was one of the underlying principles of contract law.[1] Even though the parties could subject a contract to certain conditions, the Roman jurists did not recognise a

[1] For a (differentiating) survey see Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford/New York: Clarendon Press, 1990), pp. 578, 800.

specific doctrine relieving the parties of their obligations if unexpected circumstances occurred.[2] Hence Fritz Schulz, referring to the Roman law of sale, stated that there was an 'iron rule' of the binding power of (sales) contracts once they were concluded.[3] Against such a background it is not surprising that the first statements about the question of changing circumstances emerged in the philosophical discourse. Cicero (106 BC–43 BC) appears to be the first thinker to reflect on this situation.[4] He argued that it would be unethical to return a sword to its depositor if this depositor had become insane in the meantime.[5] That situation was, as Cicero stated, an example of numerous cases where the course of time would change something originally honourable into a dishonourable pattern.[6] As we shall see later the moralist essentials of this notion became influential especially in the Christian tradition and therefore also in the context of medieval canon law. It was, however, Seneca (4 BC–AD 65)[7] who created the formula of the *clausula rebus sic stantibus* by stating that 'all conditions must be the same as they were when I made the promise if you mean to hold me bound in honour to perform it'.[8]

Nevertheless, it was the sword example used by Cicero that was transmitted in the early tradition of Christian thought. Augustine of Hippo (AD 354–AD 430) inserted this case in a treaty on the psalms, stating that it would be 'evident' ('*manifestum*') that due to the changed mental

[2] Cf. Otto Fritze, 'Clausula rebus sic stantibus', (1900) 17 *Archiv für bürgerliches Recht*, 20–49, at 22 *et seq.*; Margarethe Beck-Mannagetta, 'Die clausula rebus sic stantibus und die Geschäftsgrundlage in der Dogmengeschichte', in: Bruno Paradisi (ed.), *La formazione storica del diritto moderno in Europa* (Florence: Leo S. Olschki, 1977), vol. III, pp. 1263–76, 1267 *et seq.*; for a survey see also Rudolf Meyer-Pritzl, '§§313–314: Störung der Geschäftsgrundlage. Kündigung von Dauerschuldverhältnissen aus wichtigem Grund', in: Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann (eds.), *Historisch-Kritischer Kommentar zum BGB* (Tübingen: Mohr Siebeck, 2008), vol. II, n. 4.

[3] Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951, repr. 1961), n. 917. In particular Schulz referred to the question whether the exchange of services could be reversed. Critical of this generalising statement, however, is Zimmermann, *Law of Obligations*, p. 800.

[4] For Cicero's position in the legal and philosophical discourse of his time see Jill Harries, *Cicero and the Jurists. From Citizens' Law to the Lawful State* (London: Duckworth, 2006), pp. 51–8 *et passim*, arguing that Cicero considered philosophy and rhetoric to be higher than jurisprudence.

[5] Cicero, De officiis 3, 95: *Si gladium quis apud te sana mente deposuerit, repetat insaniens, reddere peccatum sit, officium non reddere . . .*

[6] Cicero, De officiis 3, 95: *Sic multa, quae honesta natura videntur esse, temporibus fiunt non honesta.*

[7] Brad Inwood, *Stoic Philosophy in Rome* (Oxford/New York: Clarendon Press, 2005).

[8] Seneca, De beneficiis, 4, 35, 3: *Omnia esse debent eadem, quae fuerunt quum promitterem, ut promittentis fidem teneas.*

condition of the depositor the sword would have to be kept at the depository.[9] This statement was transmitted in the textual context of medieval canon law.[10] This becomes clear in the *Decretum Gratiani* (composed around AD 1140), which marked the rise of a scientific medieval canonical jurisprudence.[11] The insertion of the Augustine text in Gratian's *Decretum*[12] appears to have been the starting point[13] for a debate between the medieval jurists concerning if and to what extent a change of circumstances would also result in a change of a contract. Johannes Teutonicus, the author of the *Glossa ordinaria* on Gratian's *Decretum*,[14] drew the conclusion from the Augustine text that every contract would be subject to the condition of constant circumstances.[15] Teutonicus applied this rule even to an oath sworn by a husband never to leave his wife and then noticing that his wife is betraying him. Pope Innocent III had already ruled that, for this case, the oath would be subject to the condition of the lawful behaviour of the wife.[16]

[9] Augustine, Enarrationes in psalmos, 5, 7: *si cui gladius commendetur, et promittat se redditurum cum ille qui commendavit poposcerit; si forte gladium suum repetat furens, manifestum est tunc non esse reddendum, ne vel se occidat vel alios, donec ei sanitas restituatur.*

[10] For the transmission of the Augustine text, mainly by Ivo of Chartres (AD 1040–AD 1117), see Linda Fowler-Magerl, *Clavis Canonum. Selected Canon Law Collections before 1140* (Hannover: Hahrsche Buchhandlung, 2005) (Monumenta Germaniae Historica, Hilfsmittel, 21), (for references in Ivo's Decretum, his Panormia and the so-called 'Tripartita', which was created at least in his environment).

[11] See as a survey Thomas Duve, 'Corpus Iuris Canonici', in: Stanley N. Katz (ed.), *Oxford International Encyclopedia of Legal History*, (Oxford University Press, 2009), vol. II, pp. 218–225. See also Andreas Thier, 'Corpus Iuris Canonici', in: Albrecht Cordes, Heiner Lück and Dieter Werkmüller with philologic co-operation by Ruth Schmidt-Wiegand (eds.), *Handwörterbuch zur Deutschen Rechtsgeschichte*, (Berlin: 2nd edn, 2008), vol. I, pp. 894–901, 895–6.

[12] *Decretum Gratiani*, Causa 22, Quaestio 2, c. 14.

[13] The question of the medieval origins of the *clausula* doctrine has been controversially debated; see the survey in Beck-Mannagetta, 'Die clausula rebus sic stantibus', pp. 1268–70. It has also been argued that the major point of textual reference has been D. 12.4.8. See for this position Meyer-Pritzl, '§§313–314', n. 4, who, however, does not even mention the approach of Gratian's *Decretum*. See also Reinhard Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter . . ." Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die civilistische Praxis*, 121–73, 134.

[14] For a short survey see Kenneth Pennington, Medieval Canonists, s. v. 'Johannes Teutonicus' http://faculty.cua.edu/pennington/1140i-p.htm.

[15] Johannes Teutonicus, Gloss ad C. 22 q. 2 c. 14, ad v. 'furens', quoted from the Lyon edition of 1618, col. 1258: *Ergo semper subintelligitur haec conditio, si res in eodem statu manserit . . . Et est hic arg(umentum) quod propter novum casum datur auxilium . . .*

[16] Decretal *Quemadmodum*, 2.24.25 *. . . quia in illo iuramento talis debet conditio subintelligi, si videlicet illa contra regulam desponsationis non venerit*; see for this decretal also Robert Feenstra, 'Impossibilitas and Clausula rebus sic stantibus. Some Aspects of Frustration

Commenting on this papal ruling, Teutonicus made it clear that 'many conditions have to be seen with oaths like these ...' and referred to his formula *si res in eodem*.[17] Obviously, here the legal treatment of unexpected circumstances was grounded in the idea that the parties would establish rules for future developments which they did not foresee at the time of contracting.

A similar notion was discussed by the glossators of Roman law:[18] Accursius (AD 1182/5–AD 1260/3) created the formula *rebus sic se habentibus*, which was applied by Bartolus (AD 1313–AD 1357) to two cases and was widened by Baldus (AD 1327–AD 1400) to all cases of promises.[19] Similar to the canonistic tradition, Bartolus and in particular Baldus limited the binding power of a promise by postulating an implied tacit condition. Thus Baldus stated as a 'rule that every promise is to be understood with the circumstances being the same (*rebus sic se habentibus*)'.[20] Later on, the learned jurisprudence adopted these conceptions.[21] As Baldus' statement shows, the normative approach to unexpected circumstances now included interpretation (in terms of a kind of rebuttable presumption of the inclusion of an implied tacit condition). This becomes clear in particular in the writings of Philippus Decius (AD 1434–AD 1535).[22] He stated as a 'general rule that the words of a contract and of a statute are to be understood under the circumstances being and that they can therefore be contravened if a supervening event occurrs (*ex causa supervenienti*)'.[23] This

of Contract in Continental Legal History up to Grotius', in: Alan Watson (ed.), *Daube Noster, Essays in Legal History for David Daube* (Edinburgh/London: Scottish Academic Press/Chatto and Windus, 1974), pp. 78–104, 82.

17 Johannes Teutonicus, 'Apparatus glossarum', in: Kenneth Pennington (ed.), *Compilationem tertiam*, Gloss ad 3 Comp. 2.15.11 ad v. subintelligenda condicio (Vatican City: Biblioteca Apostolica Vaticana, 1981 = Monumenta Iuris Canonici, ser. A, vol. 3), p. 285: ... *quod plerumque condiciones intelliguntur in iuramentis ut hec* ....

18 Feenstra, 'Impossibilitas', pp. 82 *et seq.*

19 For a detailed analysis see Michael Rummel, *Die 'clausula rebus sic stantibus'. Eine dogmengeschichtliche Untersuchung unter Berücksichtigung der Zeit von der Rezeption im 14. Jahrhundert bis zum jüngeren Usus Modernus in der ersten Hälfte des 18. Jahrhunderts* (Baden-Baden: Nomos, 1991 = Fundamenta Juridica, 13), pp. 24–8.

20 Baldus de Ubaldis, 'Commentary ad D. 46.3.38, n. 2', in: Baldus de Ubaldis, *Commentaria Omnia* (Venice: 1599), vol. IV, fol. 36va: ... *regulam, quod omnes promissio intelligitur rebus sic se habentibus.*

21 For a detailed analysis see Rummel, *Clausula*, pp. 38–66 with further reference.

22 For a short bio-bibliographical survey see Pennington Medieval Canonists, http://faculty.cua.edu/pennington/1298l-z.htm.

23 Philippus Decius, Consilia sive responsa, consilium 335 n. 4, quoted from the edition Venedig 1570, fol. 364ra: *Et est regula communis quod verba contractus et statuti intelliguntur rebus sic stantibus ideo ex causa supervenienti contraveniri potest.*

kind of presupposition of an implied condition fits within the overall tendency of learned medieval jurisprudence in the area of contractual obligations: since the late twelfth century the principle of *pacta sunt servanda* had become the leading rule first for the canonists and later on for the legists.[24] According to this doctrine, the binding power of every contract was based on the power of the contractual promise. Hence, a unilateral withdrawal from a contract was based on the content of the promise itself and constructed as a tacit condition. The canon law doctrine regarding breaches of contract corresponded to this approach: every contractual promise was given under the tacit condition that the promisee complied with the duties created by his contractual promise. If the promisee failed to do so the promisor was no longer bound by his initial promise, because the condition of his promise had not been fulfilled.[25] Thus the legal remedy for a change of circumstances and also a breach of contract was derived from the idea of the contractual promise.[26] Sharply distinct from this doctrine was the medieval conception of error and mistake, which only referred to essential elements of the contract itself (comprising *error in negotio, in corpore, in persona*).[27]

3. The Early Modern period

The continuing rise of the *pacta sunt servanda* doctrine during the sixteenth and seventeenth centuries[28] resulted in a debate on the limits of binding contractual power. In the course of that debate

24 For a survey see James Gordley, 'Good Faith in Contract Law in the Medieval ius commune', in: Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge University Press, 2000), pp. 93–117, 95–100; for a detailed discussion see Andreas Thier, '§ 311 Abs. 1 BGB', in: Schmoeckel, Rückert and Zimmermann (eds.), *Historisch-Kritischer Kommentar zum BGB*, vol. II, n. 11–14 with further references.

25 In the canonist doctrine this condition was formulated with the words *si fides servetur*, cf. Georges Boyer, *Recherches Historiques sur la Résolution des Contrats (Origines de l'article 1184 C. Civ.)* (Paris: Hachette, 1924), pp. 221–42. For a survey see Andreas Thier, '§§346–359 BGB', in: Schmoeckel, Rückert and Zimmermann (eds.), *Historisch-Kritischer Kommentar zum BGB*, vol. II, n. 18.

26 For a similar perspective see Zimmermann, *Law of Obligations*, pp. 580 *et seq.*

27 Wolfgang Ernst, 'Irrtum. Ein Streifzug durch die Dogmengeschichte', in: Reinhard Zimmermann (ed.), *Störungen der Willensbildung bei Vertragschluss* (Tübingen: Mohr Siebeck, 2007), pp. 1–34, 11–17.

28 For a survey see James Gordley, 'Some Perennial Problems', in: James Gordley (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001), pp. 1–21, 4–8, and Thier, '§311 Abs. 1 BGB', pp. 17–20.

the perspectives on the issues resulting from changes of circumstances shifted to the question whether and to what extent the contractual parties would include the altering conditions of their agreement in their contractual will. The starting point of this discussion was marked by Andreas Alciatus (AD 1492–AD 1550). He argued that the condition *rebus sic stantibus* was not always part of the will of the parties and that therefore also a change of their contractual will could not be assumed in every case of changing circumstances. Instead Alciatus distinguished between legal acts having been unilaterally set and acts based on a mutual agreement. In the case of a unilateral act a change of the party's will could be assumed if the party would presumably have disposed according to the new situation. In the case of mutual consent, however, the rule was not applicable in favour of only one party, as in this situation the will of both parties was crucial.[29] So, in Alciatus' concept the binding power of a contract and its basis in the originally concordant will of both parties prevailed – at least in tendency – over the interest of one single party to be relieved from its contractual obligations according to a change of circumstances.[30] But Alciatus made one important exception to his rule: if a new and not considered circumstance (*causa inconsiderata*) emerges, which *both* parties have presumably not preconceived, the rule of *rebus sic stantibus* will be applicable.[31] In this concept the idea of an implicit condition apparently lost ground. The emergence of an unexpected event was dealt with by an objective concept which had its basis not in the covenant itself but in the limits of the parties' foresight.

Initially, Alciatus' ideas found only little resonance in the jurisprudential debate.[32] Ulrich Zasius (AD 1461–AD 1535), for example, widened the concept of the *clausula rebus sic stantibus* stating 'as every agreement

[29] Andreas Alciatus, 'Tractatus de Praesumptionibus, praesumptio 16, n. 5 and 6', in: Andreas Alciatus, *Commentarii in aliquot Iuris civiles et Pontificii titulos* (Bale: 1557/1558, repr. Frankfurt/Main, 2004), vol. 4, col. 684: *Cum quaeritur an voluntas intelligitur, rebus sic stantibus aut sumus in actu dependente ex voluntate unius, et tunc si res incidat in casum, in quem verisimile sit disponenentem alias dispositurum, censetur mutata voluntas. . . . Aut loquimur in actu descendente ex voluntate duorum et non attenditur ista clausulae rebus sic stantibus, nec licet alteri mutare voluntatem.*

[30] For a more in-depth discussion of this complex doctrine see also Rummel, *Clausula*, pp. 80–5 with further reference.

[31] Alciatus, Tractatus, n. 6, col. 684: *Fallit . . .(scil. Regula), quando superveniet aliquis causa inconsiderata, de qua a partibus nihil verisimiliter esse agitatum.*

[32] Rummel, *Clausula*, pp. 85–95.

contains the tacit condition, i.e. *rebus sic stantibus*, a change of the things results in a change of the state of the agreement'.[33] Hugo Grotius (AD 1583–AD 1645), however, developed a more restrictive conception, which is, again, no coincidence: Grotius created a new doctrine of contract,[34] which he understood as a combination of a promise ('*promissio*') and the transfer thereof to the (potential) partner in the contract.[35] The *promissio* was also the starting point for Grotius' discussion of a limitation of contractual obligations by a *conditio tacita* and similar elements. Similar to Alciatius and some moral theologians[36] Grotius focused on the will of the promising party. He argued that the binding power of a promise was to be limited in two cases: if the underlying will of the obligation was defective or if a situation emerged that resulted in a contradiction to the will.[37] As part of the first restriction, the *defectus originarius voluntatis*, Grotius discussed the case of a 'failure of the reason (*ex cessatione rationis*), which alone and effectively moves the will'.[38] The difficulty here is the meaning of *ratio*. The term is sometimes interpreted as 'rationality' in general.[39] If this understanding is correct then Grotius would have introduced a new and very powerful device for

[33] Ulrich Zasius, 'Consilia, vol. 1, consilium 12, n. 81', in: Ulrich Zasius, *Opera omnia* (Lyon: 1550, repr. Aalen, 1966), vol. 6, col. 145: *tamen quia quaelibet conventione in se tacitam conditionem habet, scilicet rebus sic stantibus. . . unde rerum conditione mutata, iam et conventionis status mutatur.*

[34] For a detailed discussion see Malte Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Cologne: Böhlau, 1959) (Forschungen zur neueren Privatrechtsgeschichte, vol. VI); Bruno Schmidlin, 'Die beiden Vertragsmodelle des europäischen Zivilrechts: das naturrechtliche Modell der Versprechensübertragung und das pandektistische Modell der vereinigten Willenserklärungen', in: Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (Heidelberg: C.F. Müller, 1999), pp. 187, 190–193.

[35] Hugo Grotius, *De iure belli ac pacis libri tres in quibus ius naturae et gentium item iuris publici praecipua explicantur* (2nd edn, 1631, publ. by B. J. A. de Kanter-van Hettinga Tromp, 1939; Nd. 1993 newly edited based on the edition of 1646, by Robert Feenstra), pp. 335 *et seq.* (II, 11, §14): *Ut autem promissio jus transferat, acceptatio hic non minus quam in dominii translatione requiritur.* For this detail see also Thier, '§311', n. 17.

[36] Rummel, *Clausula*, pp. 96–101.

[37] Grotius, *De iure belli* p. 421 (II, 16, §22): *Restringens interpretatio (scil. promissionis) extra significationem verborum quae promissionem continent, aut ex defectu petitur originario voluntatis, aut ex casus emergentis repugnantia cum voluntate.*

[38] Grotius, *De iure belli*, p. 421 (II, 16, §22): *. . . ex cessatione rationis quae sola plene et efficaciter movit voluntatem.* The translation in the text stems from the translation in the anonymous English edition (1738), which was later edited by Jean Barbeyrac and, more recently edited by Richard Tuck, cf. Hugo Grotius, *The Rights of War and Peace* (Indianapolis: Liberty Fund, 2005), vol. II, p. 875.

[39] Rummel, *Clausula*, p. 103 with n. 390 and further reference.

the judicial control of contracts. *Ratio* (and its failure) would depend on the judgment of the court, thus being independent from the individual contract-related intentions of the parties. But another understanding of *ratio* is more likely: *ratio* might also be conceived as a reasonable motive. Evidence for this interpretation is given by Grotius' description of the relation between a promise and its *ratio*. A failure of reason is 'grounded on this, that what is contained in the promise, where such a particular reason is added or plainly implied, is not considered simply in itself, but as it falls under that reason.'[40] So, reason gave the promise its meaning and sense. But this did not mean that this specific sense had to comply with material rules of acting reasonably (e.g., to act ethically). Discussing this kind of *ratio* Grotius referred to the debate 'whether promises are to be understood with the tacit condition, if the things continue to be in the same posture'. But Grotius rejected this notion stating that the assumption of such a tacit condition 'has to be negated, unless it plainly appears that the present posture of things was included in that only reason we have talked of.'[41] At least with regard to a supervening change of circumstances Grotius did not adopt the former tradition in its original form:[42] Only if the expectation of an unchanged course of affairs is an element of the promisor's motive may the emergence of an unexpected event result in the rescission of the contract. Thus Grotius set clear limits to the *clausula* concept as only the frustration of the *specific* expectations of the promisor could trigger the rescission of the contract.[43]

There was, however, another Grotian clause for change of circumstances, the 'a new situation contradictory to the will' of the promisor (*repugnantia casus emergentis cum voluntate*).[44] It has been argued that this clause created new remedies for the modification or rescission of contracts in

[40] Grotius, *De iure belli*, p. 421 (II, 16, §23): . . . *ex eo quod contentum in promissione, ubi ratio talis additur, aut de ea constat, non consideratur nude, sed quatenus sub ea ratione venit*. For the translation in the text see Grotius, *Rights*, p. 875.

[41] Grotius, *De iure belli*, p. 422 (II, 16, §25): *Solet et hoc disputari, an promissa in se habeant tacitam conditionem, si res maneant quo funt loco: quod negandum est, nisi apertissime pateat, statum rerum praesentem in unica illa quam diximus ratione inclusum esse*. The translation in the text varies slightly from the translation in Grotius, *Rights*, p. 876.

[42] There is apparently another perspective by Martin Josef Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (Vienna/Cologne/Weimar: Böhlau Verlag, 2000 = Forschungen zur Neueren Privatrechtsgeschichte, vol. 29), p. 176, arguing that Grotius combined the *clausula* rule and elements of the traditional error doctrine '*in der Figur der conditio tacita*'.

[43] For a similar view see Zimmermann, 'Heard melodies', 135.

[44] Grotius, *De iure belli*, p. 422 (II, 16, §26). See also *ibid.* p. 421 (II, 16, §22).

Grotius' doctrine, because this clause would provide room to account for nearly every mistake as to future developments.[45] If this interpretation is correct, Grotius would, on the one hand, have limited the traditional *clausula rebus sic stantibus* rule while, on the other, have created a new and even further-ranging doctrine for a change of circumstances. But this understanding turns out to be arguable if we take a closer look at Grotius' text. A *repugnantia* against the will of the promising person could emerge in two situations: the fulfilment of a promise could violate a law as in the case of the sword, mentioned above. More important is the second case in which a contradiction to the original will emerges because the performance of the obligation appears to be too 'grievous and burdensome either regarding the condition of human nature absolutely considered or by a comparison of the person and the thing in question with the very end of the engagement'.[46] Grotius gave three examples for this situation: first, an object, lent out to someone, could be demanded before the end of the time-span fixed in the contract if the lender had an urgent need for it; second, the promise to provide military support could cease if the promising party was attacked itself; and third, the exemption from taxes must not to be understood as an exemption also from extraordinary subsidies in the situation of a 'pressing necessity of affairs'.[47] As these examples demonstrate, the doctrine of the *repugnantia casus emergentis cum voluntate* corresponded more with a – quite restrictive – concept of exoneration limited to singular circumstances. Grotius was the first jurist with a precise conception of these cases. But it did not apply to other cases of an unexpected change of circumstances. In general, it might be concluded that Grotius based the *clausula* rule on the will of the parties thus adopting essential elements of the former tradition. At the same time he also took a more objective approach (based apparently on an Aristotelian tradition of equity, which will not be discussed here[48]): by focusing on the *ratio* of a promise as a reference point for a change of

[45] Apparently in this direction see Schermaier, *Die Bestimmung des wesentlichen Irrtums*, pp. 176 *et seq.*; for a survey of other similar approaches see Rummel, *Clausula*, pp. 107 *et seq.*

[46] Grotius, *De iure belli*, p. 423 (II, 16, §27 n. 1): . . . *nimis grave atque intolerabile: sive absolute spectata conditione humanae naturae, sive comparando personam et rem de qua agitur, cum ipso fine actus*; for the English version (slightly different from that in the text) see Grotius, *Rights*, pp. 877 *et seq.*

[47] Grotius, *De iure belli*, p. 423 (II, 16, §27 n. 1): . . . *summa necessitas*; the expression in the text is derived from Grotius, *Rights*, p. 878.

[48] James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), pp. 89 *et seq.* and *passim*.

circumstances and its impact on the contract, Grotius developed (at least in principle) a more objective standard.

Grotius' doctrine became very influential in continental European jurisprudence in the seventeenth and eighteenth centuries.[49] Over time the doctrine was slightly modified. Heinrich von Cocceji (AD 1644–AD 1719),[50] for example, accepted the rule of the tacit condition, *si res maneant quo sunt in loco*, but tried to limit its application to the essentials of a contract (*substantia negotii*).[51] Other authors, however, argued in favour of a broad application of the *clausula rebus sic stantibus* rule. This is in particular true for Augustin Leyser (AD 1683–AD 1752), who combined natural law and the newly emerged doctrine of the *usus modernus pandectarum* in his writings. For the purposes of this report, Leyser is an interesting author because he argued – apparently for the first time – not only in favour of a rescission of the contract, but also in favour of a modification: a modification should take place if a promise contained not only one but multiple *rationes*. In this case it would be wiser, as Leyser put it, 'that the promise is not dissolved, but modified in order to adapt to the present time and condition'.[52] Leyser's contribution to the evolution of *clausula rebus sic stantibus* is important also with regard to another point: often referred to as a supporter of a nearly boundless application[53] of the *clausula* doctrine,[54] Leyser reflected on the dangerous consequences of exactly such a boundless practice of the *clausula* rule and warned against a *maximus abusus* thereof.[55] In order to

[49] For a short survey see Zimmermann, 'Heard melodies', 135.

[50] For an English account of Cocceji's biography and his influence on Prussian judicial reforms see Hermann Weill, 'Judicial Reform in Eighteenth Century Prussia: Samuel von Cocceji and the Unification of the Courts', (1960) 4 *The American Journal of Legal History*, 226–40; for a recent survey see Christoph Link, 'Menschenwürde und Gerechtigkeit als Staatszweck. Zum Werk Heinrich von Coccejis (1644–1719)', in: *Die Ordnung der Freiheit. Festschrift für Christian Starck zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck, 2007), 87–98.

[51] For a detailed discussion see Rummel, *Clausula*, pp. 110–16.

[52] Augustin Leyser, *Meditationes ad pandectas* (Leipzig: 1744), vol. 7, specimen 520, §5, p. 847: *. . . promissio non penitus remittenda, sed temperanda tamen, atque ad presente tempus et conditionem adcommodanda est.*

[53] Cf. his statement *omnis stipulatio intelligitur, rebus sic stantibus*; Leyser, *Meditationes*, Specimen 520, §1, p. 842.

[54] See e.g. Zimmermann, *Law of Obligations*, p. 580, and Meyer-Pritzl, '§§313–314', n. 5; for a former and influential similar argument, see Roderich von Stintzing and Ernst Landsberg, *Geschichte der Rechtswissenschaft, section 3, sub-volume 1: Das Zeitalter des Naturrechts (Ende 17. bis Anfang 19. Jahrhundert)* (Munich: 1898, repr. Aalen: 1978), pp. 210 *et seq.*

[55] Leyser, *Meditationes*, Specimen 520, §3, p. 843: *Neque est, quod cum aliquibus metuas, admissa hac doctrina, instabilem pactorum et promissorum omnium fidem fore Nihil enim est, quod metuas, si modo magistratus officium suum facit, nec cuiuslibet circumstantiae mutationem pro justa contractus rescindi causa admittit . . .*; Specimen 520, §4, p. 845: *Regulae, quam in praecedentibus commemoravi: quod omnis stipulatio rebus sic stantibus intelligatur, et mutate rerum facie, obligare desinat; maximus est abusus. Confugiunt ad eam, quotquot promissionis suae poenitet, et casum ac vicissitudinem qualemcumque, in rebus humanis indeclinabilem, inconstantiae suae causam obtendunt. Impudenter saepe. Et faciunt id tamen etiam in negotiis ac controversiis publicis . . .* For a similar approach to Leyser, see Klaus Luig, 'Richterkönigtum und Kadijurisprudenz im Zeitalter von Naturrecht und Usus modernus: Augustin Leyser (1683 – 1752)', in: *Das Profil des Juristen in der europäischen Tradition. Symposion aus Anlaß des 70. Geburtstages von Franz Wieacker* (Ebelsbach: Gremer, 1980), pp. 295–333, 325 *et seq.* and *passim.*

prevent this kind of abuse Leyser argued that a change of circumstances could result in a rescission of the contract only if three conditions were fulfilled: (i) the promise would not have been given if the new circumstance had been present at the time of the original contractual agreement; (ii) the party claiming a rescission of the contract must not have been responsible for the change of circumstances; and (iii) the change of circumstances could not have been foreseen and prevented by the parties.[56] Therefore, in this approach a more objective – and quite modern – approach was presented: the remedy for unexpected changes of circumstances was no longer sought in the idea of a tacit condition. Instead it was considered to be crucial whether and to what extent the risk of a future change of circumstances could be located in the sphere of a contracting party. If this risk was not attributable to either party a rescission (or modification) of the contract was only possible if the new circumstance was crucial for *both* parties.

Leyser's position appears to be typical of a general trend in Europe.[57] Even though the *clausula* rule was accepted in general, it was at the same time held that this doctrine was limited to essential changes of circumstances.[58] This also became clear in the great codifications of the late eighteenth century.[59] The Bavarian Codex Maximilianeus Bavaricus

[56] Leyser, *Meditationes*, Specimen 520, §3, p. 843: *. . . ut, si eadem rerum facies, quae nunc est ab initio adfuisset, alter nihil promisisset. Videndum praeterea, an mutatio haec sine omni eius, qui recedere a pacto cupit, culpa acciderit . . .*. Specimen 520, §4, p. 845 (Headline): *Mutatio rerum, quam paciscentes facile ab initio praevidere cavereque potuerunt, non tribuit justam recedendi ab obligatione causam.*

[57] See as a survey: Helmut Coing, *Europäisches Privatrecht, Bd. I: Älteres gemeines Recht (1500–1800)* (Munich: C.H. Beck, 1985), p. 412, now corrected by the study by Rummel, *Clausula*, pp. 132–78.

[58] Zimmermann, 'Heard melodies', 136, even argues that the *clausula* rule was going to vanish; another perspective – similar to the argument in the text – can be found in Meyer-Pritzel, '§§313–314', n. 5 with further references.

[59] For a short survey regarding the legal treatment of unexpected circumstances in the late eighteenth century codifications see Beck-Mannagetta, 'Die clausula rebus sic stantibus', pp. 1274 *et seq.*

Civilis adopted Leyser's doctrine in part.[60] The General State Laws for the Prussian States (1794) ruled that if an unexpected change of circumstances made the attainment of the declared contractual purpose or the purpose of the nature of the contract impossible, every party could withdraw from the contract.[61] A similar rule was inserted in the Austrian General Civil Code, but it only referred to the law of preliminary contracts.[62]

Another approach, however, was adopted in English common law. Here, the idea of absolute liability in contract left no room for the impact of unexpected circumstances on the contract. The case of *Paradine* v. *Jayne*[63] established the tradition of absolute liability in contract and attributed the risk of unexpected circumstances to each party.[64] In *Paradine* v. *Jayne* a tenant had been expelled from his leased grounds by a foreign army and had claimed to be excused from rental payments. But the Court of the King's Bench rejected this argument. The judges held 'that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor.' The background of this argument was the idea of absolute binding contractual power, 'when the party by

[60] See for a more in-depth discussion Jochen Emmert, *Auf der Suche nach den Grenzen vertraglicher Leistungspflichten* (Tübingen: Mohr Siebeck, 2001 = Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, 32), pp. 152 *et seq.*

[61] §378 I 5 ALR: *Wird jedoch durch eine solche unvorhergesehene Veränderung die Erreichung des ausdrücklich erklärten, oder aus der Natur des Geschäfts sich ergebenden Endzwecks beyder Theile unmöglich gemacht, so kann jeder derselben von dem noch nicht erfüllten Vertrage wieder abgehn.* §377 I 5 ALR laid down the rule that in general a change of circumstances would give no right to deny contractual duties: *Außer dem Fall einer wirklichen Unmöglichkeit, kann wegen veränderter Umstände, die Erfüllung eines Vertrags in der Regel nicht verweigert warden.* For a more in-depth discussion see Emmert, *Suche*, pp. 152–9.

[62] *Die Verabredung, künftig erst einen Vertrag schließen zu wollen, ist nur dann verbindlich, wenn sowohl die Zeit der Abschließung, als die wesentlichen Stücke des Vertrages bestimmt, und die Umstände inzwischen nicht dergestalt verändert worden sind, daß dadurch der ausdrücklich bestimmte, oder aus den Umständen hervorleuchtende Zweck vereitelt, oder das Zutrauen des einen oder andern Theiles verloren wird.*

[63] (1647) Aleyn 26 = [1558–1774] All ER 172; for a detailed discussion of *Paradine* v. *Jayne* and its antecedents, see David Ibbetson, 'Absolute Liability in Contract: the Antecedents of Paradine v. Jayne', in: *Consensus ad Idem. Essays in the Law of Contract in Honour of Guenter Treitel* (London: Sweet & Maxwell, 1996), pp. 3–37, *passim*, and Guenter Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 1994), 2–001–2–004.

[64] For this common view of *Paradine* v. *Jayne* see, e.g., Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 2nd edn, 1995), pp. 0.49–54 (also with a short survey on the parallel development in American contract law); Guenter Treitel, *The Law of Contract* (London: Sweet & Maxwell, 11th edn, 2003), p. 866, who calls this approach the 'doctrine of absolute contracts'.

his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'[65] In this approach there was no room for the idea of tacit conditions or reasonable motives as possible reference points for a modification or a rescission of the contract in case of an unexpected change of circumstances. This judicial approach prevailed in England until the late nineteenth century even though minor exceptions to the *Paradine* rule had been granted by the courts.[66]

4. The nineteenth and early twentieth centuries

At the beginning of the nineteenth century the impact of the *clausula* doctrine was weak throughout Europe. As mentioned above, the German codifications and also the French Civil code exhibited varying degrees of reluctance to accept the idea of tacit conditions.[67] Instead the rules of error and impossibility covered cases of supervening events. This development was set forth in the contractual doctrine of the Historical School.[68] Here the binding power of the contractual will (or the protection of reliance on the contractual faith of the other party) left no room for the application of the *clausula* doctrine. This development was similar to the hostility of the pandestic doctrine towards the rescission of a contract in general.[69] It might be that the rapid economic change and the new dynamic of commerce fostered a change to these doctrinal standpoints, even though there is no clear evidence for this assumption in the available sources. However, during the late nineteenth century in Germany and in England new approaches to an unexpected change of circumstances emerged. While in Germany the crucial impulse was set by a legal author, Bernhard Windscheid (AD 1817–AD 1892), who presented the doctrine of presupposition ('*Voraussetzungslehre*'),[70] the development in the English common law was dominated by the courts, which began to apply the doctrine of frustration.

[65] *Paradine* v. *Jayne*, (1647) Aleyn 26.

[66] Treitel, *Frustration and Force Majeure*, 2–007–2–021.

[67] *Supra* at n. 59. See also Meyer-Pritzl, '§§313–314', n. 6.

[68] For a survey see Thier, '§311 BGB', nn. 19–21 with further references.

[69] For this phenomenon see Thier, '§§346–359 BGB', n. 24.

[70] Bernhard Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (Dusseldorf: 1850); Bernhard Windscheid, 'Die Voraussetzung', (1892) 78 *Archiv für die civilistische Praxis*, 161–202. For a detailed discussion see Emmert, *Suche*, pp. 137–47.

The onset of the frustration doctrine was marked by the case of *Taylor* v. *Caldwell* in 1863:[71] the Surrey Gardens and Music Hall, rented by the plaintiff Taylor (and his partner Lewis) 'for the purpose of giving a series of four grand concerts and day and night fêtes at the Gardens', had been 'destroyed or so far damaged by accidental fire as to prevent' these 'entertainments'.[72] The plaintiffs demanded compensation for their losses (caused by their expenses in preparation and advertising).[73] Based on the *Paradine* rule this compensation would have had to be granted. Instead the court of the Queen's Bench rejected the claim: 'Although the civil law is not of itself authority in an English court', Blackburn, J stated, 'it affords great assistance in investigating the principles on which the law is grounded'.[74] In fact, Blackburn, J adopted this (as we have seen, former) tradition and stated that 'the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor'.[75] As a consequence both parties were excused and their losses thus apportioned.[76] Later on, this rule[77] was applied not only to cases of impossibility,[78] but also to cases where the commercial *contractual purpose* was frustrated as in the famous coronation cases[79] like *Krell* v. *Henry*.[80] These cases – later recognised as typical cases of *frustration of purpose*[81] – arose as a consequence of the postponement of Edward VII's coronation and the eventual revision of its route.[82] Numerous contracts which had mostly been concluded in anticipation of the Royal Progress in order to provide facilities like seats or locations to watch the coronation became useless due to these events. Thus, as in *Krell* v. *Henry*, the question arose how to apportion the losses of this kind

[71] (1863) 3 *Best and Smith's Reports* 826. For a more in-depth discussion see Treitel, *Frustration and Force Majeure*, 2-024–2-028.
[72] (1863) 3 *Best and Smith's Reports* 826 (827). [73] *Ibid.* (827). [74] *Ibid.* (835).
[75] *Ibid.* (833 *et seq.*).
[76] For a more in-depth discussion see Treitel, *Frustration and Force Majeure*, 2-026–2-028, 2-039.
[77] For a survey of the impact of the *Taylor* doctrine on the development of the American jurisdiction, see the report in *Opera Co. of Boston, Inc.* v. *Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094 (4th Cir. Va. 1987), 1097 with further references.
[78] Treitel, *Frustration and Force Majeure*, 3-001–5-058.
[79] For a survey see Treitel, *Law of Contracts*, pp. 867, 885–7, and for a more in-depth discussion Treitel, *Frustration and Force Majeure*, 7-005–7-013.
[80] (1903) 2 KB 740.
[81] See, e.g., Treitel, *Frustration and Force Majeure*, 7-001–7-004.
[82] See *Ibid.*, 7-005 for further details.

of supervening event. The Court of Appeal ruled that the cancellation of the procession discharged the contract because the procession was seen as 'going to the root of the contract, and essential to its performance'.[83] Even though the court extensively relied on Roman law, it might be remarked that the rationale of this decision was similar to Grotius' concept of a reasonable motive and its cessation due to a supervening event. For the purposes of this chapter it is, however, more important to note that the coronation cases apparently marked the height of a judicial development pointing towards the erosion of the sanctity of contract. In later decisions the English courts restricted the application of the *Krell* doctrine.[84] Thus 'in the interests of commercial certainty' the English courts gave the principle of the sanctity of a contract more and more importance.[85] Nevertheless, the evidence remains that by the late nineteenth century the idea of an implied condition[86] and thus an element of the former continental legal tradition had become part of the English law of contract.

In contrast, Windscheid's doctrine of presupposition did not suggest an implicit condition as the English courts had initially done. Instead Windscheid tried to restrict the *extent* of the contractual will by including 'presuppositions' in it. Windscheid distinguished conditions, motives and presuppositions in relation to the declaration of intent ('*Willenserklärung*'). They all had in common a restriction of contractual will. But while the condition meant 'only, if', the presupposition meant 'I want, but I would not want if not'.[87] Thus in the case of the presupposition the expectations of the parties became elements of the contract as far as they formed a part of the contractual will (and thus the declaration of intent). This approach marks a distinction between the *clausula* rule and the presupposition doctrine: while the *clausula* rule had been developed to protect the promisor against the *incertitude* of future developments, Windscheid focused on the *fulfilment* of the original intentions of the parties. If these expectations were frustrated, the party was given an *exceptio doli* and it could reclaim what it had given

[83] (1903) 2 KB 740 (748).
[84] Treitel, *Frustration and Force Majeure*, 7-014–7-033; Treitel, *Law of Contracts*, pp. 885–7, 898–908.
[85] Treitel, *Frustration and Force Majeure*, 2-037, with a short survey of the later developments.
[86] For a discussion of alternative constructions, which are, however, strongly connected to the idea of an implied condition see Treitel, *Law of Contracts*, pp. 920–3.
[87] Windscheid, 'Die Voraussetzung', 195.

to the other party in order to perform the contractual obligation. Windscheid's idea was, however, fiercely contested[88] and thus his attempt to insert a rule on presupposition into the German Civil Code failed. The principle of the sanctity of a contract was given more and essential importance.[89]

Nevertheless, German jurisprudence maintained its focus on cases of unexpected circumstances.[90] The most famous contribution to this discussion came from Paul Oertmann (AD 1865–AD 1938).[91] In his treatise on the '*Geschäftsgrundlage*' he took up elements of Windscheid's ideas:[92] The '*Geschäftsgrundlage*' was to be understood as the mutual consented presupposition of the contract. In this doctrine, a change of circumstances only had relevance for the contract if this circumstance was of importance for both parties. The German Reichsgericht adopted Oertmann's doctrine in 1921.[93] This development should perhaps be understood against the background of a new tendency of the courts, which had emerged since about the turn of the century arising in particular in the period since around 1920: the German courts[94] were ready to take social changes into account, particularly as the economic developments during and after World War I extensively changed the framework of many contracts. The most prominent example of this tendency is the so-called 'revaluation cases'.[95] From

[88] For a fierce criticicsm see Otto Lenel, 'Die Lehre von der Voraussetzung (im Hinblick auf den Entwurf eines bürgerlichen Gesetzbuchs)', (1889) 74 *Archiv für die civilistische Praxis*, 213–39, and Otto Lenel, 'Nochmals die Lehre von der Voraussetzung', (1892) 79 *Archiv für die civilistische Praxis*, 49–107. For a discussion of these debates see Emmert, *Suche*, pp. 143–7, and Ulrich Falk, *Ein Gelehrter wie Windscheid. Erkundungen auf den Feldern der Begriffsjurisprudenz* (Frankfurt am Main: Uittorio Klostenmann, 1989 = Ius Commune, Sonderhefte, Studien zur Europäischen Rechtsgeschichte, 38), pp. 210–14.

[89] Meyer-Pritzl, '§§313–314', nn. 10, 13.

[90] For a survey, see *ibid.*, nn. 14–17. For a parallel development in Italian jurisprudence (influenced by the German discourse), see Christian Reiter, *Vertrag und Geschäftsgrundlage im deutschen und italienischen Recht. Eine rechtsvergleichende Untersuchung zum Wandel des Vertragsbegriffs und seinen Auswirkungen auf die Regeln über den Wegfall der Geschäftsgrundlage in der neueren Rechtsgeschichte und im modernen Recht* (Tübingen: Mohr Siebeck, 2002 = Studien zum ausländischen und internationalen Privatrecht, 89), pp. 45–64.

[91] Rüdiger Brodhun, *Paul Ernst Wilhelm Oertmann (1865–1938): Leben, Werk, Rechtsverständnis sowie Gesetzeszwang und Richterfreiheit* (Baden-Baden: Nomos, 1999 = Fundamenta Juridica, vol. 34).

[92] Paul Oertmann, *Die Geschäftsgrundlage. Ein neuer Rechtsbegriff* (Leipzig: 1921).

[93] RGZ (3 February 1922) 103, 328, 332.

[94] For a parallel development in Italy see Reiter, *Vertrag und Geschäftsgrundlage*, pp. 64–75.

[95] See as a survey Frank Laudenklos, 'Aufwertungsrechtsprechung', in: *Handwörterbuch zur Deutschen Rechtsgeschichte I* (Berlin: 2nd edn, 2005), col. 345–7. For a more in-depth discussion (including the developments in Austria, France and Switzerland) see Emmert, *Suche*, pp. 309–416.

[96] Luigi Lombardi Vallauri, *Geschichte des Freirechts* (Frankfurt am Main: Uittorio Kostermann, 1971 = Studien zur Philosophie und Literatur des neunzehnten Jahrhunderts, 10).

[97] For a positive judgement of the 'Geschäftsgrundlage' by the 'Freirechtsschule' see Meyer-Pritzl, '§§313–314', nn. 51–4.

a theoretical point of view, one may refer this trend to the emergence of the so-called School of Free Right ('Freirechtsschule'),[96] whose followers endorsed the adoption of Oertmann's doctrine by the courts.[97] Eventually, in 2002, the German legislator incorporated the doctrine of '*Geschäftsgrundlage*' into the BGB (§313).

5. Conclusion

Initially, in the Roman context, dealing with unexpected circumstances was an ethical issue. Medieval canon and Roman law, however, took an approach based more on the parties' will thus creating the idea of a tacit condition. This approach mirrors the rise of the idea of the promise as the basis of the contract being introduced by medieval canon law.

In the Early Modern period the elementary function of the parties' will gained an even greater endorsement. It is indicative for this development that particularly the humanistic jurists (such as Andreas Alciatus) discussed the question of the *clausula rebus sic stantibus* in the context of the *interpretatio* of contractual will. This is shown, most clearly, in the Grotian rule that a change of circumstances can only have relevance – at least in principle – if it is related to the *ratio* of a party which was visible to the other party. The idea of a *repugnantia casus emergentis cum voluntate* is in certain ways also characteristic of this development: the expectations of the promising party – as far as they are included in its will – become the reference point for the further existence of the contract. It should be noted, however, that Grotius restricted the scope of this rule to some very specific cases.

By the eighteenth century, it had become clear to jurists that the *clausula* doctrine could be dangerous for the stability of contracts and promises. Nevertheless the authority of the tradition and – last but not least – the perception of a continuing dynamic change appeared to be too strong to abandon this doctrine in general. Augustin Leyser's statements and also the legislative provisions of the late eighteenth and the early nineteenth century revealed a tendency to limit the *clausula* doctrine particularly by the elements of fault and risk.

The English common law went in another direction in this period. The idea of the absolute contract left no room for a rescission or modification of a contract due to unexpected circumstances: the contractors' absolute liability also extended to these kinds of complications and attributed their risk to the promisor.

The emergence of a new approach to contracts in the nineteenth century in continental Europe resulted initially in a decline of the *clausula* rule. Widespread hostility to the rescission of a contract resulted in a growing hostility to a consideration of the normative relevance of unexpected circumstances for the contractual promise. After 1850, however, Windscheid's idea of the tacit presupposition revived to a certain extent the Grotian tradition and increased the protection of the parties' contractual expectations. However, the principle of the sanctity of a contract was undermined by this kind of approach. Thus Windscheid's concept remained without immediate effect. In the long run, however, it triggered a discussion which apparently supported the emergence of a similar but more restrictive concept, the doctrine of the '*Geschäftsgrundlage*'. The intense social and, in particular, economic changes during the 1920s fostered the adoption of this doctrine by the German (and later also the Italian) courts.

While the *clausula* rule vanished in continental Europe, it found its way to the English courts. This can be demonstrated by cases like *Caldwell* v. *Taylor* and *Krell* v. *Henry* where the doctrine of frustration is based on the idea of an implied condition. However, the frustration concept was increasingly restricted in its further application by the common law courts. It appears as if the English courts – similar to some of their continental counterparts – were anxious to create a legal device for dealing with cases of unexpected circumstances but remained reluctant to use it.

3 Law and economics: the comparative law and economics of frustration in contracts

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1. Introduction

Frustration of purpose is a defence to the enforcement of a contractual obligation. Legal systems generally provide this defence when an unforeseen event undermines a party's purpose for entering into a contract. In many legal systems frustration of purpose is often treated and discussed jointly with the related doctrine of impossibility, which concerns situations where unforeseen events render impossible (practical impossibility) or far more burdensome (economic impossibility) the performance of the obligations specified in the contract. Although different in their substance, the economic analysis of the doctrines of frustration and impossibility share a common logic. In the following analysis we shall therefore treat these doctrines together.

When unexpected contingencies occur during the performance of a contract, there may be a divergence between what the parties have expressly agreed upon in the contract and what they have implicitly assumed was their contractual obligation in terms of assumption of risk. In other words, when there is a period of time between the conclusion of the contract and the performance of the parties, there may be a fundamental change of circumstances that makes the performance of the contract far more burdensome, or even physically impossible, for one party, or that completely frustrates the purpose of the contract for one party. The event that causes the change is, as said, unexpected or unforeseen and is not explicitly referred to in the parties' agreement. If it were in the parties' agreement, the general rules on breach of contract would apply. In all of these cases, the overarching question is whether the burdened party should be obligated to perform (or, if its performance has become impossible, pay damages) or whether it may